Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-446

IN THE

Supreme Court of the United States

October Term, 1986

FLYNT DISTRIBUTING CO., INC.,
Petitioner,

against

JACKIE COLLINS LERMAN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

JEFFREY H. DAICHMAN
GRUTMAN MILLER GREENSPOON
& HENDLER
505 Park Avenue
New York, NY 10022
(212) 888-1900
Counsel for Respondent

October 10, 1986

15 pp

Question Presented.

Whether the Court of Appeals erred in determining that the district court misinterpreted a prior Court of Appeals decision to tax as costs excessive and unusual interest expenses for obtaining a loan to collaterialize a supersedeas bond, even though such a cost is not authorized by statute and the only applicable rule limits such cost to the bond premium.

Table of Contents.

	Page
Question Presented	i
Table of Authorities	ii
Statement of the Case	1
Reasons for Denying the Writ	6
Conclusion	10

TABLE OF AUTHORITIES.

CASES:

Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. 1982)	6
Creed v. Apog, 377 Mass. 522, 386 N.E.2d 1273 (1970)	9
The Europe, 190 F. 475 (9th Cir. 1911)	7
Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964)	6, 10
Illinois v. Sangamo Construction Co., 657 F.2d 855 (7th Cir. 1981)	6
Kemart Corp. v. Printing Arts Research Laboratories, Inc., 232 F.2d 897 (9th Cir. 1956)	7

Page

Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2d Cir. 1984), cert. den., ____ U.S. ____, 105 S.Ct. 2114 (1985) 2

Shakey's Inc. v. Covalt, 704 F.2d 426 (9th Cir. 1983) 7

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, 316 F.2d 275 (9th Cir. 1962) 7, 9

Trans World Airlines, Inc. v. Hughes, 515 F.2d 173 (2nd Cir. 1975), cert. den., 424 U.S. 934 (1976) 8-9

STATUTE:

Fed. R. App. Proc. 39(e) ..... *passim*

OTHER AUTHORITIES:

6 Moore's Federal Practice ¶54.70[5] (1986) 7

N.Y. Jur. 2d Credit Cards and Letters of Credit §§ 18-19 (1983) 8

10 Wright, Miller & Kane, Federal Practice & Procedure 2d §2668 (1983) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986.

FLYNT DISTRIBUTING CO., INC.,

Petitioner,

against

JACKIE COLLINS LERMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

Respondent Jackie Collins Lerman respectfully requests that this Court deny the petition for a writ of certiorari to review the unanimous decision of the United States Court of Appeals for the Second Circuit entered on April 29, 1986.

Statement of the Case.

The petition in this case raises no issue worthy of review by this Court. The question presented involves the mundane issue of costs on appeal, and is governed strictly by Rule 39(e) of the Federal Rules of Appellate Procedure rather than by the scant authorities cited by petitioner which predate the enactment of that rule.

Petitioner seeks recovery of $64,821 as the "interest differential" between what it allegedly paid as interest on a $1 million loan used to collateralize a supersedeas bond and the amount it would have earned had the $1 million collateral been invested at prevailing rates rather than sitting idly as it apparently did. Petitioner seeks to hold respondent accountable for this large and unusual cost even though no rule or statute allows it, even though it was never authorized by the district court and even though this potential obligation was never disclosed to respondent at any time prior to the reversal of her judgment.

This litigation originally arose from a claim for violation of respondent's statutory right to privacy by falsely identifying her as a nude starlet and participant in an ogry in a pornographic magazine distributed by the petitioner.

A $10 million judgment, as remitted by the district court, was vacated and reversed in a decision filed on September 10, 1984, in which the Second Circuit held that respondent was a limited purpose public figure but had failed to prove actual malice by clear and convincing evidence. *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123 (2d Cir. 1984), *cert. den.*, ____ U.S. ____, 105 S.Ct. 2114 (1985). The Second Circuit recognized that "the degree of falsity here was severe since plaintiff was not the actress pictured," but held that "constitutional concerns" imposed the unusually high degree of fault which respondent's proof failed to meet. 745 F.2d at 133.

Prior to the reversal of that judgment, petitioner had applied to the district court for a stay of execution pending appeal. Although the district court initially required petitioner to post a $10 million bond as a security for a stay, it later adopted the agreement of the parties that a $1 million supersedeas bond would be acceptable.

The last hearing before the district court concerning the question of security was held on July 14, 1983, and culminated several days of court appearances and negotiations. At the afternoon session of that hearing, petitioner's general counsel David Kahn flew in to New York from California to explain the final solution to the problem:

> Mr. Kahn: First of all, your Honor, I want to thank the Court very, very much for its patience this morning, and its understanding.
>
> The good news is that we have been able to reach an agreement on a million dollar bond which will also serve as the appeal bond, a supersedeas bond * * *
>
> * * *
>
> Let me explain the exact scenario of what is going to be happening. The bonding company wants two things.
>
> No. 1, a letter of credit. And the way we are going to handle that is the bonding company is going to deliver to the Fidelity Bank in Philadelphia their form of letter of credit. At the same time, the bonding company is not satisfied with that, they want also an indemnity agreement from Larry Flynt and from LFP, so the bonding company is going to be sending, hopefully, from their California office to our California office the form of their indemnity agreement.
>
> We are going to make a super effort to get both of these things taken care of tomorrow * * *

No mention was made of any need by petitioner to borrow $1 million. When petitioner's general counsel announced in open court the "good news" that the parties had agreed

upon a $1 million bond and proceeded to describe the "exact scenario" of how that would be accomplished, respondent had every right to expect that the solution of a letter of credit and indemnity arrangement would be the means for obtaining the $1 million supersedeas bond.

The bond was filed in a timely fashion, and respondent heard nothing further about it until over a year later when her judgment was reversed and petitioner sought release of the supersedeas bond. It was only then for the first time that respondent was informed that $1 million had been borrowed and, according to petitioner's general counsel, had been held by the bonding company for over a year without interest.*

In January 1985, the judgment clerk initially refused to allow petitioner to tax any costs because its application was untimely, but the district court subsequently permitted taxation of costs due to petitioner's "excusable neglect." The interest cost was rejected by the clerk's office, but other costs were taxed in petitioner's favor in the amount of $22,701.62, which respondent has paid in full. Included in the costs taxed by the clerk and paid by the plaintiff was $5,312.50 representing the premium charged for the supersedeas bond, an item of costs specifically permitted by Fed. R. App. Proc. 39(e).

When petitioner applied to the district court for relief from the clerk's refusal to tax the interest cost, an evidentiary hearing was held on March 5, 1985. During the course of the cross-examination of a witness from the

*The statement at page 4 of the petition that "there was full disclosure, on the record" of the proceedings before the district court of petitioner's need to borrow $1 million to obtain a bond is inaccurate and misleading.

bonding company, the district court interrupted the proceedings to reject petitioner's application. At the hearing, the district court observed that the $1 million loan was never disclosed to respondent or her counsel until after the case was reversed and the problems encountered in effecting the letter of credit and indemnity arrangement were likewise kept secret from respondent and her counsel. Subsequently, petitioner sought to reargue its motion and present a request for only $64,821 as the "interest differential" rather than the full interest cost of $183,751. Upon petitioner's application for reargument, the district court, without a further hearing and without explaining its reasoning, allowed the "interest differential" of $64,821 to be taxed in favor of petitioner.

Respondent appealed that determination, and it was unanimously reversed by the Second Circuit on April 29, 1986. In its opinion, the Second Circuit recited the security arrangements which had been agreed to by the parties:

> "In describing this agreement to the District Court, FDC's counsel represented that the bond would be backed by a letter of credit. It subsequently developed that FDC could not secure a letter of credit. Instead, without notifying the District Court or Lerman, FDC collateralized a bond issued by Aetna Casualty and Surety Co. with a deposit of $1 million cash that FDC had borrowed" (A3).*

In addition to discussing the relevant facts, the Second Circuit analyzed the case law presented to it as well as the applicable statute, Fed. R. Civ. Proc. 39(e), and concluded that the unusual interest cost claimed "sought in

---

*References preceded by "A" are to the appendix to the petition.

addition to the premium on a supersedeas bond, is not a permissible item of taxable appellate costs."

Reasons for Denying the Writ.

Far from raising any issue of conflict among the circuits or an important question of federal law which should be settled by this Court, the petition complains about a decision concerning the routine application of the cost statute.*

This Court has cautioned restraint in taxing unusual costs:

> "[T]he discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964).

Thus, "[c]ourts are to award, except in limited exceptional circumstances, only those expenses specifically recognized by statute." *Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 864 (7th Cir. 1981) (citation omitted). As the court in *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982), stated in analogous circumstances: "we hold that expenditures for those categories of expenses listed in 28 U.S.C. §1920 may be recovered only if they are allowed by that section."

Fed. R. App. Proc. 39(e) specifically provides for the taxing of only the "premiums paid for the cost of super-

---

*There is no issue here of meaningful appellate review in a First Amendment case because petitioner *agreed* to post a bond it could afford in order to stay execution pending appeal.

sedeas bonds or other bonds to preserve rights pending appeal," although Congress was surely aware of other incidental expenses that would necessarily be incurred in obtaining such a bond.* Congress' treatment of the category of appeal bonds without providing for the taxation of related incidental expenses indicates the legislative intent to prohibit the taxation of these other expenses.

The federal cases cited by petitioner, such as *The Europe,* 190 F. 475 (9th Cir. 1911), and *Kemart Corp. v. Printing Arts Research Laboratories, Inc.,* 232 F.2d 897 (9th Cir. 1956) (where the court *denied* the unusual costs expended in obtaining security pending appeal), and *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products,* 316 F.2d 275 (9th Cir. 1962) (where the net borrowing expense allowed was far less than the premium required for a bond), preceded the amended version of Rule 39 and therefore are not controlling. No federal cases have been cited which in any way conflicts with the intent of Rule 39(e) or reveals a conflict among the circuits.

Furthermore, whenever a large or unusual expense is incurred, the courts and commentators have agreed that the better practice is to seek prior judicial approval if the party incurring the expense expects to recover it later as an item of taxable costs. See 6 Moore's Federal Practice §54.70[5] at 54-333 and n.7 (1986); accord, *Shakey's Inc. v. Covalt,* 704 F.2d 426, 437 (9th Cir. 1983); 10 Wright, Miller & Kane, Federal Practice and Procedure 2d, §2668 at 204 (1983). As demonstrated above, rather than disclose to the district court or to respondent the need to borrow $1 million, petitioner misled all concerned by announcing a

*Under the American rule, most major litigation expenses, including attorneys' fees, investigatory services and travel costs, whether or not incurred in connection with a supersedeas bond, are simply not taxable unless otherwise provided by statute.

letter of credit* and indemnity arrangement without even hinting at the prospect of borrowing cash as collateral.

In *Trans World Airlines, Inc. v. Hughes,* 515 F.2d 173 (2d Cir. 1975), *cert. den.,* 424 U.S. 934 (1976), the principal decision relied upon by petitioner below and the only case cited by the district court in awarding the "interest differential," several notable distinctions eliminate that case as support for petitioner's argument.

First, the "letter of credit was obtained, with agreement by the parties, as an *acceptable substitute* for the $75 million bond which would otherwise have been required." 515 F.2d at 177 (emphasis added). Thus, the fee for the letter of credit was taxed instead of the premium for a bond to secure the $145 million default judgment, which bond would have been "impracticable to obtain." *Id.* at 175. In this case, the Second Circuit explained that its decision in *Trans World Airlines* was influenced by the fact that "the letter of credit served the same purpose as a supersedeas bond" and "the fee paid on the letter of credit was an allowable cost of appeal because it was analogous to the bond premium cost authorized by Rule 39(e)" (A6-A7).

Second, the substitute security in *Trans World Airlines* was *consented to* by the parties and *approved* by the

---

*The whole point of a letter of credit is to avoid putting up cash. The letter of credit provides a "practical method of financing" by utilizing the issuing bank's credit to "postpone actual payment." N.Y. Jur. 2d, Credit Cards and Letters of Credit, §18 at 304 (1983). A letter of credit "resembles a contract of guaranty" because it "engages the credit of the issuer in support of an indebtedness of the customer to the beneficiary." *Id.* at §19 at 304. Thus, a letter of credit is a commercial device that relies upon *credit* rather than *cash*—there would be no purpose in obtaining a letter of credit if $1 million in cash was available as security.

district court. Here, of course, neither the respondent nor the district court was made aware that petitioner needed to borrow $1 million to collateralize the bond; the only consent given was for a $1 million bond instead of the $10 million bond originally ordered by the district court, and all that was revealed during the post-judgment hearings was that the "exact scenario" for the security arrangements involved a letter of credit together with an indemnity agreement.

Third, the costs allowed in *Trans World Airlines* were in fact "less than a surety bond would have cost and hence in the end—because TWA lost on the appeal—saved it money." *Id.* at 178. See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, supra* ($150,776.18 in net interest expense where the total bond premium would have been $240,000). The Second Circuit logically interpreted Rule 39(e) both in the *Trans World Airlines* case and in this case to mean that "costs of appeal that are agreed to and less expensive substitutes for costs explicitly authorized in Rule 39(e) are allowable" (A6).*

It would be especially egregious to tax respondent with costs she could not have anticipated since petitioner misled her and the district court about the actual security arrangements which were undertaken. As the Second Circuit noted, the method for obtaining adequate security "was not the concern of Lerman" (A6) and unless she consented, the district court approved the procedure or the expense was less than what Rule 39(e) allows, the unusual in-

---

*In a state case cited by petitioner, *Creed v. Apog*, 377 Mass. 522, 386 N.E.2d 1273 (1979), the court noted that if defendant had not obtained a letter of credit as collateral for a bond, the actual premium cost for the bond would have been higher than the $19,500 expended for the letter of credit.

terest expense was properly rejected. As this Court cautioned in *Farmer v. Arabian American Oil Co., supra,* 379 U.S. at 235, district judges do not have "unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case."

CONCLUSION.

For the foregoing reasons, the petition for certiorari should be denied.

October 10, 1986

Respectfully submitted,

JEFFREY H. DAICHMAN
GRUTMAN MILLER GREENSPOON
& HENDLER
505 Park Avenue
New York, NY 10022
(212) 888-1900
Counsel for Respondent